JD(SF)-15-03
Honolulu, Hawaii

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

HTH CORPORATION DBA
PACIFIC BEACH HOTEL

Employer

and Case 37-RC-4022

INTERNATIONAL LONGSHORE &
WAREHOUSE UNION, LOCAL 142, AFL-CIO

Petitioner

REPORT ON CHALLENGED BALLOTS AND OBJECTIONS

On September 26, 2002, the Regional Director for Region 20 of the National Labor Relations Board (Board), issued an Amended Report on Challenged Ballots and Objections in the captioned matter, and, finding that the challenged ballots election objections raised substantial and material issues of fact that could best be resolved by a hearing, ordered that a hearing be conducted before an administrative law judge.

The hearing was held between the dates of October 1 and December 4, 2002, in Honolulu, Hawaii. The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Employer and counsel for the Petitioner (or Union). Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

1. Background

The representation petition in Case 37-RC-4022 was filed on April 26, 2002.[1] Following the issuance of a Decision and Direction of Election on July 2, a representation election was held on July 31, among the Employer's employees in a unit determined to be appropriate. The tally of ballots served upon the parties at the conclusion of the election shows that of approximately 565 eligible voters, 209 cast votes for the Petitioner, 204 cast votes against the Petitioner, one ballot was determined to be void, and there were 36 ballots challenged either by the Petitioner or by the Board. Following the election the Petitioner timely filed fourteen objections to the election.

[1] All dates or time periods hereinafter are within 2002 unless otherwise specified.

At the outset of the hearing the parties reached agreement on certain challenged ballots. It was stipulated that the ballots of the following 13 individuals should not be counted as they were not eligible voters: James Amsbery, Maria Darngun, Chisayo Igarashi, Cirilo R. Lopez, Minh Nguyen, Darryl Oshiro, Jesus l. Paza, Alfredo C. Pescador, Alejandro Rarogal, Mieng Sirivattha, Bert Takahashi, Alejandro Tumbaga, Clayton Woo.

Further, at the conclusion of the hearing the Union withdrew its challenges to the ballots of the following three individuals: David Tanimoto, Melanie Rubin, Reden Bartolome. Accordingly, the ballots of these individuals shall be counted.

2. The remaining 20 challenged ballots

Jane Fee has held the position of curator in the curator department since 1995. The curator department takes care of the fish and water-quality system for the Oceanarium, a large 280,000 gallon aquarium some three stories in height. Fee's name tag identifies her as "Curator Supervisor." She also takes care of the water-quality systems for all of the displays at the hotel, including other aquariums and lobster tanks. She also performs clerical work in the Ocenarium office. She is hourly paid. The curator department formerly had a manager, but has not had a manager for a number of years. According to Linda Morgan, Director of Human Resources, Fee became the person in charge when the curator manger left. Fee reports to Hiram Higashida, Corporate Environment and Conservation Specialist, who is also responsible for the operations of the landscaping department at both the Pacific Beach and the Pagoda Hotel, another hotel owned by HTH, the Employer's parent corporation. According to Fee, Higashida goes to the other hotel about every day. Higashida has a separate office elsewhere, in a different part of the hotel from Fee's office. Fee will customarily see Higashida about three times a day.

There are about eight curator department employees who are known as divers. They wear appropriate diving gear while performing work inside the Oceanarium, and apparently also perform related duties. Fee approves the divers' vacations and prepares their work schedules, but Higashida "has the final say" in the schedules. Fee also prepares an evaluation form for each of the divers, evaluating their work performance on a periodic basis. After preparing the form, she submits it to Higashida and the two of them review the evaluation together. If Higashida agrees with her conclusions he will sign the evaluation and Fee will, in turn, present it to the diver. If the diver agrees with the evaluation he or she is asked to acknowledge this by signing the form. If the diver disagrees, then Fee and the diver will discuss the matter with Higashida. When one diver requested permission to change his work schedule from full-time to part-time, Fee requested that another full-time diver be hired. This request was approved by management.

Leslie Shim was hired as a diver on May 22. Shim testified that divers feed the fish, clean the Ocenarium, clean other holding tanks in the hotel, and perform other related duties. Shim testified that on August 28, about a month after the election, she had a performance review and evaluation meeting with Fee. She believes Fee is the individual who wrote the comments regarding her qualifications, for example: "[Shim] has proven to be a very motivated and competent employee…she always makes good use of her time and can be depended upon…will have no problem moving through the diver level and becoming a valuable staff employee." As a result of this favorable evaluation, which was given upon the completion of Shim's 90-day new-hire orientation period, Shim received a raise.

After diver applicants have been screened by human resources they will be sent to Fee's office and Fee and a senior diver will talk to them to determine their ability to do the required work, and will then have them perform certain diving tests to insure that they are able to meet established criteria. After evaluating the applicant's qualifications, Fee will take the applicant to Higashida, who interviews the individual and determine whether the diver should be hired. Thus, according to Fee, all she does in the hiring process is verify that the applicant meets the minimum requirements.

According to Human Resources Director Morgan, Fee does not discipline divers but may recommend this. Morgan testified that Fee will discuss the situation with Higashida, "and both of them would sit in and talk to the employee," but Higashida is the individual who has the responsibility to make the decisions regarding discipline.

It is the position of the Employer that employees with the title of supervisor are not statutory supervisors within the meaning of the Act. While this appears to be the case for the most part, *infra*, the situation regarding Fee is clearly distinguishable. Thus, there is no department manger for the curator department, and it appears that Fee took over at least some of the duties of the former department manager. Fee authorizes vacations and prepares the work schedule. Moreover, Fee's involvement in the evaluation process is significant, particularly given the fact that Fee, rather than Higashida, is in close contact with the divers and is thus able to observe and evaluate their work performance on a day-to-day basis. Under these circumstances, and absent any contrary evidence, it is reasonable to assume that Higashida, who did not testify in this proceeding, relies heavily upon the recommendations of Fee regarding any matters in the curator department, including personnel matters, that require attention.

Accordingly, I find that Fee effectively recommends that employees be rewarded or not rewarded in accordance with her evaluation of their performance, and that this authority is conferred upon her permanently due to the absence of a department manager. I am aware of the fact that another department, the landscaping department, is also without a manager, and that the challenge to the ballot of a person with the title of landscaping "supervisor" has been withdrawn by the Union; nevertheless, there is no record evidence regarding the duties and responsibilities of that individual, and thus there is no basis for a comparison between the authority of that "supervisor" and Fee. .

Accordingly, I recommend that the Board's challenge to the ballot of Jane Fee be sustained.

Alma Hamamoto began working for the Employer in about 1996. She currently works at the business center on the day shift, and has the title of supervisor. The front desk operations, primarily checking guests in and out and handling their inquiries, are located in two separate areas. It appears that the business center desk, where Hamamoto works, primarily handles business oriented guests rather than vacationing guests, but the work at each of the front desk operations is essentially the same. The Director of Front Office Services and five assistant managers, who are salaried, oversee these desks. Hamamoto was a senior Guest Service Agent (GSA) prior to August 7, 2000, when she was promoted to her current position of "Working Supervisor" and was given the responsibility for "ensuring consistency of standards and services of the desk." She is hourly paid and earns more than the other GSAs. She works on the day shift with two other full time GSAs and, on occasion, one on-call GSA, and wears a name-badge bearing her name and the title "supervisor." Hamamoto testified that the position of working supervisor is "more like a title…but my responsibilities are pretty much the same [as senior GSA]…there isn't any added responsibilities," and she performs the same work and shares the same responsibilities as the other GSAs. Since 1996 she has received a 30 percent

employee discount for restaurant and room accommodation purchases; rank and file employees customarily receive a 20 percent discount for such purchases.

On October 5, 2000, she was notified that she had met all the requirements for admission into the "Certified Hospitality Supervisor (CHS) program," and was awarded a certificate and lapel pin. On August 4, 2001, she completed a different program for which she received another certificate and lapel pin signifying her accomplishment of meeting the "Certified Front Desk Representative program standards…"

Should a business center guest ask for a supervisor, the guest is referred to Hamamoto. If a guest complains, for example, that a GSA was rude, Hamamoto will apologize, and usually that is sufficient. Then she will report the incident to an assistant manager who handles the situation with the GSA, as Hamamoto does not handle personnel matters. She may, on occasion, recommend discipline; in such instances the assistant managers will talk to her about the situation and then conduct their own investigation. Also, she reviews the yearly performance evaluations of the GSAs after they have been drafted by the manager or assistant managers, but before they are finalized and given to the GSAs. Thus, she may be asked if she has any additional input regarding a specific employee. (Similarly, Hamamoto believes that the managers will ask other GSAs about Hamamoto's work performance.) Her input is not accepted at face value, and if she voices a concern that warrants discussion the assistant manager will discuss the matter with her and decide whether the employee's evaluation should be modified. Then, after the evaluation is finalized, she sits in as a "witness" when the assistant manager presents the evaluation to the GSA.

One of Hamamoto's duties is to draft a weekly work schedule for the day shift. She gives the draft to the assistant manager who will review and modify it based on occupancy considerations. The GSAs do not request vacation time or time off or changes in their schedules from Hamamoto; rather, they bring their requests to the assistant managers who approve or deny the requests. Hamamoto prepares the weekly schedules after the vacation or other requests have been acted upon by the assistant managers. The assistant managers, not Hamamoto, make the phone calls to the individuals they want to call in to work.

According to Human Resources Director Morgan, working supervisors of the front desk and business center desk primarily perform the same duties as the other GSAs. In addition, they oversee daily operations insofar as the need arises to assist the GSAs with the servicing of guests, and provide the GSAs with support and assistance when new front desk procedures are implemented. Working supervisors ensure that the GSAs do whatever it is that they are supposed to do so that the guests will be satisfied with the service they receive.

On the basis of the foregoing, I conclude that Hamamoto is not a supervisor within the meaning of the Act as she does not effectively recommend the rewarding or disciplining of employees. She does not prepare evaluations, and her input regarding the work performance of the GSAs is not accepted at face value. Rather, it is evaluated by a manger who makes an independent investigation and/or assessment of matters that Hamamoto may bring to the manager's attention.

Accordingly, I recommend that the Board's challenge to the ballot of Alma Hamamoto be overruled, and that her ballot be counted.

Rendi Kanaiaupuni, who was not called as a witness in this proceeding, is a front desk working supervisor or GSA supervisor. She began working for the Employer in 1987, and became GSA supervisor in September, 1995. On June 6, 1997, she was given the additional position of front desk (also called Ocean Tower Desk) "Relief Assistant Manager." It appears that there are some seven or eight front desk GSAs. The record reflects that the duties and responsibilities of Kanaiaupuni as a working supervisor are the same as those of Hamamoto, who is a working supervisor at the business center, *supra*. The record evidence contains several documents regarding GSA Daniel Kadowaki that bear Kanaiaupuni's signature, namely a counseling/infraction form, and an employee evaluation form. However, these forms are signed as well as by at least three other individuals, including the department manager and division head, and there is no definitive evidence of the role Kanaiaupuni played in the issuance of these documents. Moreover, Kadowaki's evaluation contains the "manager's comments," and thus it appears that the document was prepared by the manager and not Kanaiaupuni.

Human Resources Director Morgan testified that she believes Kanaiaupuni acts as a relief assistant manager when needed or as required, perhaps once or twice a month. (The record does not reflect whether Kanaiaupuni acts in this capacity for only a day at a time or for longer periods of time.) A relief assistant manager, according to Morgan, is to "oversee the hotel, especially dealing with the guests, guest concerns, guest requests, guest complaints or anything that relates to the hotel, to the clients." There is no evidence that a relief assistant manager deals with personnel matters or has the same duties and responsibilities as a permanent assistant manager in supervising GSAs.

On the basis of the foregoing I find that Kanaiaupuni is not a supervisor within the meaning of the Act. As a working supervisor she has the same duties and responsibilities as Hamamoto, *supra*, and the record does not show either the nature or extent or any supervisory authority she may have when she acts as a relief assistant manager.

Accordingly, I recommend that the Board's challenge to the ballot of Rendi Kanaiaupuni be overruled, and that her ballot be counted.

Daniel Kadowaki is a front desk GSA. On August 4, 2001, Kasowaki received a certificate and lapel pin signifying his completion of the Certified Front Desk Representative program. On August 9, 2000, the Employer distributed an inter-office memorandum entitled "Front Office Promotions," announcing, *inter alia*, that Kadowaki had been promoted to a new position, as follows: " Daniel Kadowaki is the Sr. GSA, assisting Rendi Kanaiaupini with the responsibility of monitoring standards and services of the Ocean Tower Desk." There is no further evidence regarding Kadowaki's duties and responsibilities, but it is clear that he assists Rendi Kanaiapuni in the performance of her duties. Kanaiapuni has been found to be a unit employee, *supra.*

The Union challenged the ballot of Kadowaki on the basis that he is "Management." There is no evidence that Kadowaki acts in a managerial capacity. Further, it is clear that he is not a supervisor within the meaning of the Act. While the record does not contain specific evidence regarding Kadowaki, it is clear that he "assists" Kanaiapuni, and therefore possesses no more authority than Kanaiapuni, who has been found to be an eligible voter.

Accordingly, I recommend that the Union's challenge to the ballot of Daniel Kadowaki be overruled, and that his ballot be counted.

Chester Huan has the title of supervisor or supervising attendant at the Aloha Center Café. He has been employed since October, 1999, and has more seniority than any of the other café employees, who are called attendants or attendant/cashiers. He has held his current position for about two years. He is hourly paid and earns about $1.35 more per hour than the other attendants. The café is essentially a coffee or refreshment bar, providing coffee drinks, espresso, smoothies and pastries to customers. Huan waits on customers, takes their orders, rings up sales on the cash register, makes drinks, orders and stock supplies, and performs cleaning duties. All attendant/cashiers do the same work. Huan usually works on the morning shift with one other attendant/cashier. Either he or one of the attendants may open the café in the morning. The manager of the café, Charlie Sayles, trains the attendants, prepares their work schedules, and handles all personnel matters. The record does not reflect the amount of time Sayles actually spends in the café, and it appears that he has other duties. In the event of a customer complaint, Huan reports it to Sayles or, in Sayles' absence, the front desk manager. If an attendant does not show up for his or her shift, Huan will report this to Sayles or the front desk manager, or call the employee at home to find out the nature of the problem. His job as a supervising attendant is to make sure that the other attendants prepare the drink orders correctly by following the appropriate recipes, and to advise Sayles when an attendant is not complying. Sayles, not Huan, will then retrain the attendant or take other action. Regarding all other matters he calls Sayles or some other manager to handle the situation.

On the basis of the foregoing I find that Huan is not a supervisor within the meaning of the Act. As a working supervisor Huan performs the same duties as the other attendant/cashiers. There is no evidence that he prepares employee evaluations, and he has no authority whatsoever to deal with or resolve personnel matters; rather, he is only required to report any situations to the café manager or other managers who will take appropriate action.

Accordingly, I recommend that the Board's challenge to the ballot of Chester Huan be overruled, and that his ballot be counted.

Marlene Morimoto has been a supervisor at the Aloha Center Café since June 15, 2001. She is hourly paid. She makes coffee, rings up sales on the cash register, and performs the same duties as Chester Huan, *supra*. She works with one other employee on her shift. Morimoto testified that the café manager, Charlie Sayles, "takes care of everything." If Sayles is not in, customers who may have complaints or problems are simply told that the boss is not in at the moment, and are asked to leave their name and number. Sometimes Morimoto and the other attendant "order supplies" by writing down what items are needed and giving the list to Sayles. Either Morimoto or any other attendant may, in the absence of Sayles, sign for the merchandise when it is delivered. Morimoto testified that she does not direct the work of attendants, as they usually know what to do. There is no evidence that Morimoto evaluates employees or has any authority to deal with or resolve personnel matters.

Accordingly, I recommend that the Board's challenge to the ballot of Marlene Morimoto be overruled, and that her ballot be counted.

Scott Kazunga is a maintenance assistant/coordinator in the maintenance department. He is hourly paid. He works in the maintenance office with three other people, Chief Maintenance Engineer Victor Honami and two maintenance supervisors. He performs mostly clerical work using a computer to input work schedules, payroll information that he forwards to the payroll department, and other information. When a call comes in from a guest regarding a room problem, Honami takes the information if a supervisor is not present. Then he will prepare a work order and dispatch it to either of the two supervisors or to the maintenance employee assigned to fix the problem. Kazunga does not assign work to the maintenance employees.

Upon completion of the work, the maintenance employees report back to the supervisors, not to Kazunga. Supervisors will sometimes have him order supplies, and on infrequent occasions Kazunga may pick up supplies needed for the maintenance department.

The Union challenged to ballot of Kazunga on the basis that that he is "Management." The evidence shows that Kazunga is neither a manager nor a supervisor. Rather, he is a clerical employee in the maintenance department. Other clerks who perform clerical work are specifically included in the unit description.

Accordingly, I recommend that the Union's challenge to the ballot of Scott Kazunga be overruled, and that his ballot be counted.

Marvin Muraoka is a Pagoda Hotel maintenance employee. Both the Pacific Beach Hotel and the Pagoda Hotel are owned and operated by HTH Corporation. Employees of the Pagoda Hotel are specifically excluded from the unit. The separate employee rosters of the Pacific Beach Hotel and the Pagoda Hotel both contain the names of all the Pagoda Hotel maintenance employees. Twelve Pagoda Hotel maintenance employees voted in the election and their votes were challenged by the Union. The Employer acknowledged that ten of the twelve employees were indeed ineligible to vote, and the challenges to these ballots were resolved accordingly. The ballots of two remaining maintenance employees are in issue.

Victor Honami is Chief Engineer for the maintenance department, and is in charge of maintenance at both the Pacific Beach and the Pagoda Hotel. He spends Monday, Wednesday and Friday at the Pacific Beach, and Tuesday, Thursday and Saturday at the Pagoda. Each hotel has a separate maintenance department. According to Honami, the Pagoda maintenance employees mainly work at the Pagoda, but any time the Pacific Beach Hotel is in need of maintenance employees, Honami will ask for "volunteers" who are willing to fill in at the Pacific Beach. Honami testified that Marvin Muraoka and Emyl Schlenker, primarily Pagoda Hotel maintenance employees, also work at the Pacific Beach Hotel on occasion. The Employer did not furnish any evidence showing the number of days or frequency with which Muraoka or Schlenker have worked at the Pacific Beach Hotel.

Ruben Bumanglag is a maintenance department employee at the Pacific Beach Hotel. Bumanglag testified that Muraoka helped out at the Pacific Beach Hotel for several weeks after September 11, 2001, when a layoff or series of layoffs occurred, and then he went back to the Pagoda Hotel. Muraoka did not work at the Pacific Beach Hotel, according to Bumanglag, between April and July. At the time of the election, Muraoka's name was never placed on the Pacific Beach Hotel's weekly maintenance schedule. Bumanglag believes the Pagoda Hotel employees who come work at the Pacific Beach are paid by a Pagoda Hotel payroll check, and there is no evidence to the contrary.

On the basis of the foregoing it is clear that Muraoka is a Pagoda Hotel maintenance employee who volunteers to work at the Pacific Beach Hotel on an irregular, intermittent basis, and for limited periods of time. The community of interest he shares with the Pacific Beach Hotel employees, particularly regarding union representation, is minimal.

Accordingly, I recommend that the Union's challenge to the ballot of Marvin Muraoka be sustained, and that his ballot not be counted.

Emyl Schlenker is also a Pagoda Hotel maintenance employee. According to the testimony of maintenance employee Bumanglag, Schlenker helped out at the Pacific Beach Hotel after September 11, 2001. However, there is no record evidence of how often she worked or the date when her temporary work ended. According to Bumanglag, Schlenker also worked at the Pacific Beach between April and July, "[M]aybe once a week or not even…she doesn't even show up in a week or so."

On the basis of the foregoing it is clear that Schlenker is a Pagoda Hotel maintenance employee who volunteers to work at the Pacific Beach Hotel on an irregular, intermittent basis, and for limited periods of time. The community of interest she shares with the Pacific Beach Hotel employees, particularly regarding union representation, is minimal.

Accordingly, I recommend that the Union's challenge to the ballot of Emyl Schlenker be sustained, and that her ballot not be counted.

Donna Hashiro is a food and beverage clerk. She has been employed at the hotel for 11 years. She became full-time on July 1. Prior to that she was a part time employee doing the same work. She performs clerical work for the approximately 6 sous chefs and the food and beverage administrative assistant. She maintains files and picks up mail. She does not schedule employees, but types out the schedules for the sous chefs. She has no authority to change employees' schedules. When employees request vacations, she will give the request form to the appropriate sous chef. While employees' personnel files are located in the office she occupies, she has no information relating to the wages that employees are making, and has no access to information that may be regarded as confidential. She prepares purchase requisitions to order supplies upon instructions from the sous chefs. She handles some correspondence, but not regarding personnel matters.

On the basis of the foregoing I find, contrary to the position of the Union, that Hashiro is not a confidential employee. She is a clerical employee and is supervised by the sous chefs, who also supervise the other food and beverage employees, and she does share a close community of interest with other unit employees.

Accordingly, I recommend that the Board's challenge to the ballot of Donna Hashiro be overruled, and that her ballot be counted.

Elizabeth Fuji was employed as a regular part-time employee in the Aloha Center Café on May 9. From May 25 through July 31, she worked each week from a minimum of 19.25 hours to a maximum of 41 hours; and a weekly average of 32.05 hours.

New hires are considered to be probationary employees for three months. They are given a copy of the Employer's handbook, and receive the same benefits as the other employees, with the exception that they receive 85 percent of the wage rate of employees who have passed their probationary period. They are hired with the expectation that they will remain on the payroll as permanent employees upon the completion of their probationary period, and 95 percent of the probationary employees become permanent employees.

The record shows that probationary employees share a close community of interest with permanent employees and that it anticipated that they will become permanent employees. Moreover, from her date of hire until the date of the election, Fuji has worked each week for a significant number of hours. Probationary employees who have a reasonable expectation of continued employment are eligible to vote. *Afro Jobbing & Mfg. Corp.*, 186 NLRB 19 (1970).

Accordingly, I recommend that the Union's challenge to the ballot of Ellizabeth Fuji be overruled, and that her ballot be counted.

Leslie Shim was hired on May 22, as a regular full-time diver. From May 19 through July 31, she worked each week from a minimum of 18.50 hours to a maximum of 37.75 hours (except for the weeks of June 23 and June 30, when she was on a temporary leave of absence). She worked a weekly average of 30 hours (excluding her two-week leave of absence).

Accordingly, I recommend that the Union's challenge to the ballot of Leslie Shim be overruled, and that her ballot be counted.

Wendy Mukai was hired on June 3, as an on-call hostess, cocktail server and supervisor. Hostesses take restaurant reservations and greet and seat guests in the restaurant. When acting as a supervisor Mukai relieves the restaurant manager and performs the duties of the manager. She worked 21 days in June as a hostess and cocktail server for a total of 98.75 hours, or an average of 4.7 hours per day. She worked 23 days in July as a hostess and cocktail server for a total of 85 hours or an average of 3.69 hours per day. She also worked five days in July as a supervisor for a total of 36 hours or an average of 7.2 hours per day.

The record indicates that when assuming the duties of a supervisor, Mukai has the same duties and responsibilities as another individual, Diane Matayoshi, who is a hostess as well as a relief restaurant manager, and is included in the unit. As relief restaurant manager Matayoshi helps oversee the "front of the restaurant," takes calls, answers questions, prepares the hostess schedule, watches over the wait staff, and ensures that the guests' food is served on time. She will try to resolve problems with guests, and has authority to "comp" the bill to resolve a problem.

The unit description includes "All full-time, regular part-time and regular on-call" employees. Mukai was hired as an on-call employee. From her date of hire to the date of the election she worked a significant number of days and hours as a hostess and cocktail server, which classifications are included in the unit. She appears to act as supervisor or relief restaurant manager only intermittently, and the record evidence does not reflect that her duties and responsibilities are different than those of another relief restaurant manager, Diane Matayoshi, who is included in the unit.

Accordingly, I recommend that the Union's challenge to the ballot of Wendy Mukai be overruled, and that her ballot be counted.

Patricia Bell is a reservation clerk at the Pacific Beach Hotel, and since 1995 she has worked in the central reservations office located at the Pacific Beach Hotel. Prior to 1995, during a time period when each hotel had its own reservation department, she worked at reservations at the Pagoda Hotel. Although there has been no reservations office at the Pagoda hotel for a number of years, Bell has nevertheless remained on the payroll of that hotel. There are four other FITs (Foreign Independent Traveler) reservation clerks in addition to Bell. When guests call either hotel to make reservations they are connected with the central reservations office, and the clerks make reservations for the guests at either hotel. Bell has the same supervisor as everyone else in reservations, and her wages and benefits are the same as the other Pacific Beach reservation clerks.

From the foregoing it is clear that Bell's duties and responsibilities and conditions of employment are identical to those of the other reservation clerks who are included in the unit. The fact that she appears on the Pagoda Hotel's payroll for accounting purposes in no way minimizes her community of interest with the other Pacific Beach Hotel reservation clerks.

Accordingly, I recommend that the Board's challenge to the ballot of Patricia Bell be overruled, and that her ballot be counted.

Brenda Dolente is a reservations clerk at the Pacific Beach Hotel. Like Bell, she was a former reservations clerk at the Pagoda Hotel who has remained on that hotel's payroll for accounting purposes. She is in group reservations, along with four other group reservations clerks. These clerks are supervised by Sandra Tokunaga, group reservations manager, who also happens to be included on the Pagoda Hotel payroll for accounting purposes. All the clerks, according to Tokunaga, are cross-trained to do all the reservations work for both hotels and to cover each other. The only difference between Dolente and the other group reservations clerks is that, for accounting purposes, Tokunaga places her on the Pagoda Hotel payroll, and therefore her payroll check is a different color.

From the foregoing it is clear that Dolente's duties and responsibilities and conditions of employment are identical to those of the other reservation clerks who are included in the unit. The fact that she appears on the Pagoda Hotel's payroll for accounting purposes in no way minimizes her community of interest with the other Pacific Beach Hotel reservation clerks.

Accordingly, I recommend that the Board's challenge to the ballot of Brenda Dolente be overruled, and that her ballot be counted

Shaun Nawatani was hired on June 14, as a regular part-time employee in the restaurant as a bus help person. From June 14 or 15, until July 31, he worked each week from a minimum of 12 hours to a maximum of 26.25 hours, and had a weekly average of 19.54 hours.

The record shows that from his date of hire to the date of the election Nawatani has worked each week on a regular part-time basis.

Accordingly, I recommend that the Union's challenge to the ballot of Shaun Nawatani be overruled, and that his ballot be counted.

Shota Fujinaga was hired as a part-time general cleaner on May 16. He worked 2 hours during his first week of employment, 3.75 hours the second week, and did not work at all the next two weeks. Beginning the week of June 9 until July 31, he worked every week from a minimum of 4 hours to a maximum of 20 hours, for a weekly average of 11.46 hours per week.

Several employees, *infra*, in addition to Fujinaga, were hired on about May 16, as general cleaners. Human Resources Director Morgan testified that these individuals were hired for a "special project" designed to keep the hotel looking good with the expectation that a television production company making a TV series may contract with the Employer to book a large number of rooms for an extended period of time.

Morgan testified as follows regarding the employment of the general cleaners:

> So, the instruction is…Do everything you can to make sure that the food and beverage functions rooms and the hotel rooms are in good shape because [the television production people] can come in at any given time and do an inspection in the hotel. That was the directive from the corporate GM….And to do that, we hired some people to assist existing employees or departments so that we would be able to maintain the upkeep of the hotel.

As it turned out, this anticipated business never materialized. There is no evidence that these employees would have been discharged in the event the Employer did obtain the business it was seeking; thus, it may have been the Employer's intention to retain the special project employees at least as long as the television production crew remained at the hotel. According to Morgan, the Employer had hired some 50 special project employees, and about 30 of them are still employed; however, the record does not indicate who these employees are, whether they were all hired as general cleaners, or whether they were all hired for the same special project.

The ballots of four special project general cleaners were challenged by the Union. The record does not show how long the employment of these employees lasted, or whether they are currently employed. However, they did work at least through the date of the election. The Union did not specifically challenge their ballots on the basis that they were hired for a "special project" of a limited duration, or that they were temporary or casual employees. Rather the Union challenged their ballots on the basis that they did not work sufficient hours prior to the election to be included in the unit.

The record does not demonstrate that the special project employees were hired for an unlawful motive, namely to influence the election results either by their vote or by their presence at the hotel during the election campaign. Nor does the record show that they were hired only for some limited period, or that they were told that their employment was only temporary or other than of indefinite duration. And as noted above, according to the unrebutted testimony of Morgan, some 30 special project employees have remained employed. Other than this brief testimony of Morgan, there is no record evidence regarding the tenure of any of the special project employees. Since the Union challenged the ballots of these individuals, the Union has the burden of demonstrating by sufficient evidence that their ballots should not be counted. Moreover, it may be inferred from the testimony of Morgan that many special project employees did vote in the election and that their ballots were not challenged. Accordingly, I find that the special project general cleaners are eligible to vote providing they worked a sufficient number of hours prior to the election. See *Personal Products Corp.*, 114 NLRB 959 (1995) (temporary employees with indefinite tenure are permitted to vote); *V.I.P. Movers*, 232 NLRB 14 (1977), and *Allied Stores of Ohio*, 175 NLRB 966 (1969) (employees regularly averaging 4 hours per week prior to the eligibility date included in unit.)

For approximately two month prior to the election Fujinaga worked at least four hours per week, and had a weekly average of 11.46 hours.

Accordingly, I recommend that the Union's challenge to the ballot of Shota Fujinaga be overruled, and that his ballot be counted.

Lisa Hayashi was hired on May 16, as a part-time general cleaner. She is the daughter of John Hayashi, Corporate General Manager, of the Employer and the nephew of the Employer's owner. Lisa Hayashi worked a total of two hours in May, and 28 hours in June. She took a leave of absence during the first two weeks in July. From July 14 through July 31,

she worked only 0.25 hours (15 minutes). From the beginning of her employment until the date of the election, her weekly average, not including her leave of absence, was 3.42 hours per week.

Lisa Hayashi worked virtually no hours during the entire month prior to the election. Further, she is the daughter of the Employer's Corporate General Manager who is the nephew of the Employer's owner. Clearly, because her hours of work are negligible, she should not be included in the unit. See *Milford Plains Limited Partnership d/b/a Hampton Inn,* 309 NLRB 942, 947 (1992) (voter considered a casual employee and ineligible to vote because of insufficient hours). I also agree with the Union that she should be excluded because of her familial relationship with principals of the Employer,

Accordingly, I recommend that the Union's challenge to the ballot of Lisa Hayashi be sustained, and that her ballot not be counted.

Hidemi Oba was hired as a part-time general cleaner on May 16. He worked a total of 10 hours during the first 5 weeks of his employment. Beginning the week of June 16 until July 31, he worked a weekly minimum of 4 hours and a maximum of 20 hours, for a weekly average of 10.82 hours.

Accordingly, I recommend that the Union's challenge to the ballot of Hidemi Oba be overruled, and that his ballot be counted.

Peter To was hired on May 16, as a part-time general cleaner. From the date of his hire until July 31, he worked a weekly minimum of 2 hours and a maximum of 15.5 hours, for a weekly average of 7.08 hours.

Accordingly, I recommend that the Union's challenge to the ballot of Peter To be overruled, and that his ballot be counted.

3. The Petitioner's objections

Union objection No. 1 (Unlawful Threats and Interference): …the Employer…threatened, coerced and interfered with the rights of employees…by threatening loss of reduction of wages, hours of work, and other conditions of employment, if they voted for the Union or if the Union won representation rights.

The Employer disseminated a number of pre-election leaflets to its employees urging its employees to vote no, and held a number of departmental meetings, conducted by its managers and agents, during which it presented the Employer's position that a union was unnecessary. The Union also disseminated leaflets to the employees urging them to vote yes. The Union literature focused on the benefits to the employees of unionization, including the prospect of job security, and the profits of HTH, the umbrella organization over many different businesses including the Pacific Beach Hotel. The Employer's literature focused on the fact that unionized hotels, including hotels under contract with the Union, have closed down or have negotiated contracts calling for wage reductions. One Employer leaflet states:

> The ILWU has a track record of closing hotel operations. They have nothing to brag about. These are the facts. Three other hotels in Kona (Kona Surf, Kona Lagoon, Keauhou Beach) under ILWU contracts have closed…

> Remember Waikiki Beach Hotel?[2]
> Is KBH next?[3]
> What about Pacific Beach Hotel?

Another Employer leaflet states that the ILWU strike at the Waikiki Beach Hotel did not accomplish anything, and goes on to state:

> **DO NOT TAKE A CHANCE ON NOTHING!**
> . . .
> For the future of Hawaii, all hotel workers should be non-union. ILWU workers in Waikiki did not have a bright future. They no longer exist. **CONTINUE TO BE EMPLOYED** in a stress free non-union environment.
> **Don't risk your future on mere chance.**
> **No need Union.** (sic.) (Original emphasis.)

Another leaflet disseminated by the Employer notes that :

> Our [HTH Corporation] economic recovery program started **three years ago by eliminating the burden of KBH** and even with September 11 and the global economic downturn, **Pacific Beach Hotel is improving**. Pacific Beach Hotel has eliminated a big burden and at this time is **on its way to recovery.** (Original emphasis.)
>
> Do not be fooled by the ILWU's tricky campaign tactics.

It appears that this theme was repeated during at least one group meeting. Thus, Tammy Kaleopaa, group senior reservation clerk, testified that in July she attended about three company meetings for all the reservation clerks. A company labor consultant, Patrick Moon, conducted one such meeting on about July 18. Human Resources Director Morgan was also present. During the meeting, Moon said that the ILWU went into the Kona hotels and shut them all down, and, according to Kaleopaa, "it kind of implied that we might be next, being that that was their track record in Kona."

Contrary to the Union's position, I do not believe that the foregoing campaign propaganda is sufficient to constitute a threat that the Pacific Beach Hotel will be closed if the employees elect to be represented by the Union. Rather, the leaflets simply ask the employees to consider the Union's "track record of closing hotel operations," and caution them not to take the chance that the same thing could happen at the Pacific Beach. Clearly this is campaign rhetoric that expressed the Employer's opinion and point of view; and the Union had an opportunity to respond to these assertions and provide a reason or explanation for the closing of the hotels. Business closure and the possibility of job loss is a legitimate campaign issue relevant to union representation, and employees are entitled to hear and evaluate such assertions during an election campaign. I conclude from the evidence presented by the Union

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[2] Apparently the Waikiki Beach Hotel had a contract with the Union, there was a strike, and the hotel was sold to a different entity; as a result of the change in ownership, some 90 percent of the long-term employees were not rehired.

[3] KBH is King Kamehameha's Kona Beach Hotel. This hotel is owned by HTH Corporation, and has a contract with the Union. The company proposed a settlement agreement, ratified by the employees, calling for a 25 percent "reduction in employee costs."

that the Employer, during its election campaign, has neither threatened nor predicted the inevitability that this fate will befall the Pacific Beach Hotel or its employees, nor has it repeatedly emphasized this possibility to such an extent that the employees would reasonably believe that the Employer, without directly saying so, was impliedly threatening them with such consequences. See *Kawasaki Motors Mfg. Corp,* 280 NLRB 491 (1986). Cf. *Mohawk Bedding Co.*, 204 NLRB 277 (1973).

Sandra Tokunaga, group reservations manager, testified that she asked a group of three reservations clerks "to say 'yes' or 'no' whether they wanted representation by the Union." At the time she did not know that this question was inappropriate. They did not give her a response. Later, she learned that she should not be questioning anybody. I find that this conduct by Tokunaga constituted coercive interrogation.

Judith Agliam-Howard testified that about two or three days before the election her manager, Sandra Tokunaga, called her on the telephone and asked her if she was going to vote "yes" or '"no." She did not want to disclose how she intended to vote, and answered that she was undecided. Tokunaga asked her why she was undecided and offered to give her information that would help her decide. Tokunaga denied that she made this call to Agliam-Howard. I credit the testimony of Agliam-Howard, and find that Tokiunaga coercively interrogated her regarding her support for the union.

Virbina Revamonte testified that on July 27, the restaurant manager, Roy, put his hands on her shoulder and, in front of others, said that she was one of the "union people." There is an abundance of record evidence regarding this matter. If it did happen as described by Revamonte, it is likely that the comment was made spontaneously and in jest. As the resolution of this one incident would have no bearing on the outcome of this proceeding, it appears unnecessary to resolve the substantial conflicting testimony.

Ruben Bumanglag, a union observer at the election, testified that two days prior to the election he was called into the office by Chief Engineer Victor Honami. Apparently, Bumanglag had already asked for permission to take the day off so that he could act as an observer for the Union at the election. Honami granted the request, and then asked if he had signed a union card. Bumanglag said yes. I credit the testimony of Bumanglag. The evidence shows that Bumanglag had made his union sympathies known to the employer by requesting permission to take time off in order to act as an observer for the Union during the election. Under such circumstances, I find that the question by Honami was innocuous and non-coercive.

Regarding Union Objection No. 1, I find that the Employer coercively interrogated four employees concerning their support for the union.

Union Objection No. 2 (Unlawful Discrimination and Threats): …the Employer…discriminated against ILWU supporters and its sympathizers…[and]…threatened union supporters and singled out those supporters of the Union and thereby interfered with the Section 7 rights of such employees.

About a month prior to the election the Employer hired a private security firm. They were on the premises during the day of the election. They were wearing black shirts with an HTH logo. The regular uniform for employees is aloha shirts. The record shows that the security guards were large, imposing individuals. According to Human Resources Director Morgan, the purpose of the security guards is that the Employer began getting complaints from employees about union people going to employees' houses, and they were hired to protect the employees at work. Also, there was a union demonstration at some point where some Safeway employees

from a different union came in to the hotel lobby and distributed literature during a function that was being held at the hotel; admittedly, this had nothing to do with the instant case. There is nothing wrong or sinister about union representatives visiting the homes of employees prior to an election, and the Employer has presented no evidence that would cause it to believe that the union was engaged in any improper conduct. Thus, it appears from an interpolation of Morgan's testimony that the physical presence of the security guards was designed to demonstrate that the Employer was protective of its employees against some imagined and non-existent union threat. It appears from the Union's brief that there is no specific Union objection regarding the hiring and presence of the security guards at the hotel during the month preceding the election, and that the Union is simply objecting to specific instances of alleged security-guard misconduct as discussed below.

Virbina Revamonte testified that she was a union observer during the afternoon session, and saw about ten large, muscular, black-shirted security guards in the hallway standing in a line outside the voting area prior to the beginning of the afternoon voting session. She walked past the "line up" on her way to the restroom and heard one of them say, "Kick their ass." She turned her head toward him as saw that he was laughing; and another guard laughed at her also, and a few others were smiling and looking at her. I credit the testimony of Revamonte, and find that the remark of the security guard could reasonably be construed as a threat. There is no evidence that the security guards remained in the voting area during the election.

Armando Mogrovejo testified to an incident with a black-shirted security guard on the day of the election. The security guard approached him from behind in the lobby as he was coming to work at about 5:00 a.m. and jabbed him with his finger "eight times" in the back and then stopped him and said, "You are goddamn union. What the hell are you doing over here? I know you are union." Mogrovejo, during the course of his lengthy testimony, changed his story to some extent; he was exceedingly nervous, under a doctor's care, and, in my opinion, had difficulty distinguishing actual from imagined happenings. Therefore, it is difficult to comprehend what happened or what was said by the security guard. It is clear, however, that there was some incident or encounter with a security guard that disturbed Mogrovejo, and that the Employer's managers or agents observed it or heard about it. According to Mogrovejo's testimony, Morgan immediately attempted to apologize for what had happened or for what Mogrovejo believed had happened, and both Morgan and Mogrovejo's manager again attempted to apologize the following day. Apparently, Mogrovejo was so upset from the incident, or his imagination exacerbated the situation to such an extent, that he took an extended leave of absence. Because the credibility of Mogrovejo is questionable, I recommend that allegation be dismissed.

Regarding Union Objection No. 2, I conclude that agents of the Employer threatened one employee because of her support for the union.

Union Objection No. 3 (Unlawful Interrogation): This objection was withdrawn by the Union at the hearing.

Union Objection No. 4 (Incomplete and Misleading Excelsior List and Other Unlawful Limitations on Protected Rights): …the Employer…provided the Union wholly inaccurate, misleading, and incomplete information on the "Excelsior List" and engage (sic) in other practices to prevent ILWU supporters and campaigners access to employees, and thereby interfered with the Section 7 rights of employees.

The unit consists of approximately 585 voters. The Union maintains that the *Excelsior* list contained 81 incorrect addresses, or about 14 percent of the bargaining unit, and that this prevented the Union from communicating with these employees during a program of house to house visitation prior to the election. The Union also sent out mailers to the employees on the *Excelsior* list, and according to the lead union organizer, Matthew Yamamoto, only "a few" of the mailers were returned to the Union as undeliverable.[4] The Union does not contend that any names and addresses were *omitted* from the *Excelsior* list. See *Woodman's Food Markets*, 332 NLRB No. 48 (2000). The Employer maintains that employees are instructed to update their addresses whenever they move, and that it furnished the Union with its most recent list of current employee addresses; further, it believes all, except for perhaps three or four of the addresses, were correct.

In addition, the Employer contends that the Union's hearsay evidence to the effect that it was unable to contact some 81 employees because of incorrect addresses should not be credited due to the fact that many individuals, for a variety of reasons, may not want union representatives, or solicitors for any other cause, calling on them at home. Thus, for example, they may simply not want to discuss the Union, or may not have the time or inclination to speak with solicitors, or perhaps did not want their dinner interrupted, or may have already made up their minds about the Union. Accordingly, the hearsay evidence presented by the Union is simply not reliable.

I agree with the Employer's position. It is reasonable to assume that individuals answering their doors may have untruthfully told the union representatives that the employee they were seeking to contact had moved. For example, a union representative testified that he was told on various occasions that the particular employee he was looking for was the brother or sister or relative of the person who answered the door, that the individual no longer lived at that address, and that the new address or phone number for that person was unknown. This union representative acknowledged that he had no way of knowing whether the person answering the door was being truthful.

Finally, the Employer takes the position that if the Union believed the *Excelsior* list contained incorrect addresses, it was incumbent upon the Union to immediately notify the Regional Office and/or the Employer so that the Employer could be given the opportunity to investigate and correct the list in a timely fashion. Here, the Union admittedly made no such effort.

Hearsay evidence is inherently unreliable, and it is even more unreliable under the scenario presented by the Union in this proceeding. It would appear that in such circumstances the Union should be required to at least attempt to rectify the problem by immediately advising either the Regional Office or the Employer, or both, of any alleged incorrect *Excelsior* list

[4] Further, the Union, through Yamamoto, introduced exhibits prepared purportedly for the purpose of establishing that there were some 29 incorrect addresses on the Excelsior list as confirmed shortly prior to the date Yamamoto testified, December 3. This evidence, in addition to being hearsay, has no relevance to the correctness of the *Excelsior* list addresses prior to the election. Further, Yamamoto testified that shortly prior to his testimony he destroyed the notes that he used to compile the exhibit. Yamamoto's entire testimony is confusing and improbable, and I do not credit it. Finally, assuming *arguendo* that there were only 29 incorrect addresses on the *Excelsior* list, rather than 81, for an error percentage of less than five percent, it would appear that the Employer was well within the permissible range of "substantial compliance" with *Excelsior* list requirements.

addresses. The credible record evidence shows that the Employer believed the list contained current, correct, updated addresses as reflected by the Employer's records. There is no showing that the Employer intentionally misrepresented the addresses or was negligent in this regard by failing to require employees to notify the Employer when they moved. The Union did not notify the Regional Office or the Employer of its belief that any addresses were incorrect . Nor is there any competent evidence demonstrating the number of addresses that were, in fact, incorrect.[5] Therefore, there is no way of knowing whether the Employer was in "substantial compliance" with *Excelsior* list requirements. Cf. *Mod Interiors, Inc*., 324 NLRB 165 (1997). Under such circumstances, particularly where the percentage of incorrect addresses can not be known with any degree of reliability, I recommend that this objection be dismissed.

Union Objection No. 5(Unlawful Aid and Assistance to Other Representatives and Agents): This objection was withdrawn by the Union at the hearing.

Union Objection No. 6 (Unlawful Solicitation of Grievances): …the Employer…improperly and unlawfully solicited grievances and complaints from employees, thereby interfering with their rights under Section 7 of the Act.

Tammy Kaleopaa testified that she knew that the Employer had an open door policy. She testified that at one group meeting the employees were told by management that they didn't need to go to the Union, that if there had any concerns they could talk with management or Patrick Moon about them, and that they "should keep everything in the ohana (the HTH family)."

Ruben Bumanglag testified that he attended a meeting of maintenance department employees conducted by various managers, including Human Resources Director Morgan. About 16 maintenance employees were present. Patrick Moon made the statement that the union was not a good idea, and asked the employees what their grievances were. Not many employees replied. Bumanglag did speak up, however, and said he was mainly concerned with departmental seniority and the maintenance department pay scale. Moon directed his question to Morgan and department manager Victor Honami, and said, "to fix the problem." No other maintenance employees testified that Moon made such a statement at this meeting, and it appears unlikely that such a definitive response would be given to such an open-ended question. I believe that Bumanglag's recollection of Moon's response was inaccurate.

Milian Julian, a laundry attendant, testified that she attended a group meeting conducted by managers. According to Julian, the managers just asked if employees had any problems or questions. The remainder of Julian's testimony regarding what Moon did say at the meeting is unclear and inconsistent, and is based on leading questions; I do no credit it.

[5] This does present a serious dilemma to a union, as it would have no independent way of proving whether *Excelsior* list addresses were in fact incorrect. One way to perhaps obviate such problems in larger units is for the Region to allow ample time between the furnishing of the *Excelsior* list and the date of the election, so that the Employer may investigate the Union's claims and, if errors are indeed confirmed, furnish the Union with updated and correct addresses or a timely amended *Excesior* list.

Pasqual Orrico is a busser at the restaurant. He attended meetings conducted by managers or agents of the Employer regarding the Union. Orrico testified that he has always been aware of an open door policy.

The Employer's handbook, at page 39, required reading for each employee, contains a chapter entitled "Communication." A Heading in that chapter is entitled "Open Door Policy." The policy is, *inter alia*, as follows:

> We are proud of the close relationship we have with all of our employees. You are always free to communicate directly with your managers without outside interference or fear of reprisal. We support and believe in your legal right to remain independent and to be free to work without the necessity of paying dues, fines, fees and the assessments to any labor organization.
> * * *
> Occasionally, however, problems may arise in your work area. Before such problems can be resolved they must be expressed and remedies explored. Our Company prefers to deal directly with you, rather than through a third party. Therefore, our Company needs your cooperation in order to solve your complaints and maintain a harmonious and productive work environment.

Regarding Union Objection No. 6, I recommend that it be dismissed in its entirety, as the record shows that the Employer has always had an open door policy designed to invite employee concerns, that this policy has been included in the Employer's handbook, and that the employees were well aware of such a policy prior to the Union's organizing campaign.

Union Objection No. 7 (Unlawful Threats of Loss of Benefits and Improper Withholding of Same): …the Employer…unlawfully threatened employees that they would lose their pension and 401K plan benefits if they voted for the Union or if the Union won representational rights…[and] unlawfully and improperly withheld such improvements and increases in order to interfere with the rights of employees under the Act.

The wage increase of several reservation clerks were held up for a period of time. Elizabeth Powell, director of revenue management, oversees the reservations department among other departments. Powell testified that the evaluations of about 12 employees were prepared in about April or May. These employees were told that their wage increases, if any, were being delayed due to a restructuring and rethinking of the Employer's policies regarding tardiness, and how the matter of tardiness should be evaluated *vis-a-vis* the granting of wage increases. The process was convoluted as it involved more than just the tardiness of the reservations clerks, and was discussed and analyzed at various levels of management; this took several months. Then, on about July 15, those who were entitled to receive wage increases under the new tardiness guidelines were given the increases retroactive to the dates of their evaluations. The record does not show how many of the 12 were given wage increases. I credit the testimony of Powell, and find that the delayed wage increases were not motivated by the employee's union activity or the scheduled election.

Carmelita Fontillas, a housekeeper, testified that on about July 26, in the morning, Executive Housekeeper Myra Kobuyma told a group of housekeepers during a group meeting that if the Union got in the employees would lose their 401K plan and that the matching 3 percent contributed by the Employer would stop.

Executive Housekeeper Kobuyma testified that she does hold meetings with the employees and tries to have briefings about twice a week regarding various housekeeping matters. During one such meeting she was asked whether the employees would retain their 401K benefits if the Union got in. She replied that she did not think so, because the union contract at the Kona Beach Hotel, owned by HTH Corporation, provided for a pension plan rather than a 401K, so she believed there would not be both a pension plan and a 401K at the Pacific Beach Hotel if the Union got in. Later that morning Kobuyma asked Morgan if this was correct, and Morgan said no, that everything would have to be negotiated. Then, that afternoon at 4:00 p.m., as the housekeeping employees were leaving work, she assembled them in a group and held another meeting. She apologized for the misinformation she had given them at the meeting that morning, told them that she was wrong, and explained that if the Union got in everything, including the 401K plan, would have to be negotiated. She asked if they understood, and they said yes. I credit the testimony of Kobuyma; it was corroborated by the testimony of other housekeeping employees. I recommend that this allegation be dismissed.

Carmellita Fontillas also testified that she attended a meeting in the housekeeping office conducted by Morgan and Moon. Fontillas' testified that Moon said something to the effect that even if the Union won, "they wouldn't give us the benefits which the union is asking. So, everybody would go to strike…"

Virbina Revamonte, a union observer during the election, testified that during a meeting attended by a large number of waiters and waitresses, Moon asked why the employees believed in the Union, and said that even if the Union won the election the Employer was not going to give anything that the Union was going to ask for. At the end of the meeting Moon asked, "Who you guys going to vote?"(sic.)

Because of the nuances of campaign propaganda, it is easy to misconstrue the message being promulgated. Without substantial credible and corroborative testimony, I am unable to conclude that the testimony of Fontillas and Revamonte accurately reflects what Moon told the employees. Here only one employee from each group testified as to Moon's remarks. Further, Moon undoubtedly said many things and these witnesses were not asked to give an account of all that was said so that the accuracy of their recollections could be evaluated. The question allegedly posited by Moon to the entire group about the voting intentions of the employees was clearly a rhetorical question that did not call for a response, and the record does not show that anyone did respond. Further, I credit the testimony of Morgan and find that Moon did not make the statements attributed to him by these witnesses. I recommend that Union Objection No. 7 be dismissed.

Union Objection No. 8 ((Unlawful No Solicitation Rule): …the Employer…promulgated, implemented, and enforced an overly broad no solicitation rule.

All employees are provided a 63 page Employer handbook, entitled "HTH Corporation Standards and Policies" upon becoming employed. They are required to read the handbook and to comply with its provisions. The final page of the handbook, page 63, contains and "Employee Acknowledgment" page, with spaces for the employee's signature and a witness's signature, acknowledging, *inter alia*, the following:

> I hereby acknowledge receipt of a copy of the HTH Corporation's Employee Handbook and **agree to read and abide by the policies and rules contained herein. I understand that violations of these rules and policies constitute grounds for disciplinary action up to and including termination.** I agree that it is my responsibility to ask for clarification of any policies, procedures or benefits

> that I do not understand. Furthermore, I understand and agree that the Company may unilaterally change its rules and regulations at any time without prior notice to me and that it is therefore my responsibility to verify that I have current information. (Emphasis supplied.)

Page 61 of the handbook contains the following "No Solicitation, No Distribution of Literature, No Loitering Policy" :

> The Company does not permit solicitation of distribution of literature or loitering by employees on Company property. All employees are expected to comply strictly with Company rules. Failure to comply with these rules will result in disciplinary action, which may include dismissal. Any employee who is in doubt concerning these rules should consult with their supervisor immediately.
>
> 1. No employee may solicit or promote support for any cause or organization AT ANY TIME WHILE ON COMPANY PRPPERTY. (Original emphasis.)
>
> 2. No employee shall distribute or circulate any written or printed literature at any time while on Company property
>
> .
>
> 3. Non-employees are not permitted to distribute literature or solicit our workers or guests at any time for any purpose on Company property.
>
> **These rules apply to any solicitation or distribution of literature, including** lotteries, magazine clubs, **labor unions**, social organizations, lodges, et al., with the exclusive exception of the Aloha United Way campaign and the annual Visitor Industry Charity Walk campaign. **Any violation of these rules should be reported immediately to your supervisor or the Director of Human Resources.** (Emphasis supplied.)

This overly-broad policy is clearly unlawful in that it prohibits employee union solicitation, the promoting of support for unions, and the distribution of union literature "AT ANY TIME WHILE ON COMPANY PROPERTY." Republic Aviation Corp. v. NLRB 324 U.S. 793 (1945); *Peyton Packing Co*., 49 NLRB 828 (1943); *Our Way, Inc*., 268 NLRB 394 (1983); *Angelica Corporation*, 276 NLRB 617, 619 (1985); *Mercury Marine – Divisiion of Brunswick Corp.,* 282 NLRB 794 (1987). Thus, it precludes employees, upon threat of dismissal, from engaging in union solicitation and distribution of union literature during their non-work time and in non-work areas while on hotel property. Moreover, it requires that employees report violations of these rules to the Director of Human Resources.

The Employer, while admitting that the above portions of the handbook have never been rescinded or revised, maintains that the handbook provisions have never been enforced, that most employees were not even aware of these provisions, that discussion about the union among the employees during the election campaign has not been prohibited, and that, in fact, such discussion has been encouraged by supervisors and managers who have requested employees to make up their minds after hearing both sides of the issue.

In support of its position, the record evidence provided by the Employer shows that employees in various departments were not aware of the no-distribution and no-solicitation rules, that they did discuss the union while at work, that the Employer's managers and supervisors knew about this and did not attempt to prevent such discussions, that in fact managers and supervisors, during group meetings, told employees to learn all they could about

the issues before making up their minds, and that some union leaflets were brought on to the Employer's premises.

The Employer's evidence, as outlined above, is insufficient to show that the unlawful no-solicitation and distribution rules were, in effect, rescinded by the Employer's failure to enforce them. Indeed, there is no record evidence that even one employee actively solicited support for the union on the Employer's property by, for example, assertively supporting the union, or distributing pro-union leaflets, or soliciting employee signatures on authorization cards, or engaging in other similar conduct that would clearly identify an employee as a union activist; the most that was shown is that some employees may have indicated to other employees that they favored the Union. Contrary to the contention of the Employer, suggesting to employees that they learn both sides of the issue is not tantamount to assuring pro-union supporters that they may ignore the Employer's rules and actively engage in permissible pro-union conduct with impunity. Further, there is of course no evidence showing the extent to which employees may have refrained from engaging in permissible union solicitation and/or distribution for fear of the consequences which, the Employer emphasized, included dismissal.

The Employer requires its employees to know and understand the rules contained in the Employer handbook, and further requires the employees' written acknowledgment that they have read and understand it. The unlawful handbook rules inherently compromise the "laboratory conditions" under which elections must be conducted. Absent a clear, timely, formal rescission of such unlawful rules, it would be exceedingly difficult for the Employer to demonstrate that such rules could not have inhibited permissible pro-union support. Clearly, as set forth above, the Employer has made no such showing in this case, where the voting unit is large and diverse, the Employer's property is extensive, and the outcome of the election is dependent upon a relatively few votes. See *Freund Baking Company*, 336 NLRB No. 75 (2001) (unlawful rule in handbook warrants setting aside election.)

I recommend that Union Objection No. 8 be sustained.

Union Objection No. 9 (Unlawful Gifts and Inducements): …the Employer…unlawfully engaged in pre-election conduct by offering and providing gifts and other inducements of value, including food items, paper items, etc., which unlawfully interfered with the Section 7 rights of employees.

Following the September 11, 2001 terrorist attack on the United States it became apparent that hotel occupancy would be significantly affected at the Pacific Beach Hotel as it is a "group-driven" hotel and relies extensively on group bookings which, as predicted, were cancelled after 9/11. The anticipated loss in revenue resulted in the laying off of employees and/or the curtailing of employees' work hours. As a result, corporate management decided to open up a store, called the Ohana (Family) General Store, and stock it with goods, particularly grocery items, that the effected employees could get for free in proportion to the number of work-hours they lost. The store was located on the Employer's premises, and its shelves were stocked with canned goods, Spam, corned beef, Vienna sausage, Pampers, paper products, detergent, oil, rice, some clothing, and other staples. These items were purchased and /or donated by corporate management and also by employees who contributed goods or money to stock the store; there is no showing or estimate of how many employees may have contributed such food items and/or money. Some 200 workers obtained goods from the store,

Thereafter, the Employer's business began to increase and the store was being patronized by fewer employees. For this reason, and also because the space occupied by the store was needed for other purpose, Morgan requested permission from corporate management to close the store. This request was made in early July. It was decided to close the store with a thank-you luncheon celebration to honor the Employer's owner, H. T. Hayashi, for making the store available to the employees during difficult times. The luncheon was advertised and employees were asked to RSVP so that the kitchen could make appropriate preparations. The luncheon was held on Monday, July 29, two days prior to the July 31 election, in the Grand Ballroom of the hotel, between the hours of 10:30 a.m. and 2:30 p.m. Over 300 employees attended the luncheon. Employees from the Pagoda Hotel were also in attendance.

To advertise the luncheon, the Employer disseminated the following bulletin to its employees:

> MAHALO
> FOR TAKING CARE OF THE OHANA…
>
> At a time when families were faced with many uncertainties, H.T. Hayashi's thoughts turned to his own family of employees. Out of this concern, Herbert T. Hayashi's Ohana General Store was born. The only one of its kind, the store has assisted many employees in their time of need. Now as we say aloha to the General Store, we'd also like to say thank you for caring.
>
> You're invited to join us for a Mahalo Luncheon in honor of H.T. Hayashi and all of the generous contributors who made the HTH Ohana General Store a reality. There will be an opportunity to express your gratitude by signing a banner & giving a personal video message. In addition, there will be raffles to give away remaining items from the store.
> . . .
> RSVP to your managers by Tuesday, July 23, 2002

At the luncheon each employee was given a small gift bag containing several of the items that came from the store. While there is no record evidence of the value of the items in each bag, it appears that the value was nominal, perhaps between five and ten dollars. According to Morgan, it was decided that the gift bags should be given to each of its employees because many employees had contributed items and money to stock the store. During the luncheon corporate management, including H.T. Hayashi, went around to each table thanking the employees. In addition, a video was shown on a 12-foot by 12-foot monitor. According to Morgan this video had been prepared some two weeks prior to the luncheon for another purpose, namely, as a possible lead-in for a TV series. The video, taken at the porte cochere entrance to the hotel, depicted guests arriving and being presented with leis, and managers and employees interacting and waiving in a spirit of camaraderie. In addition to the video, on the monitor would appear the graphic, "vote no," and this graphic would be periodically displayed for several seconds. Morgan did not explain how the "vote no" graphic happened to appear on the screen. According to Morgan, the only reason for holding the luncheon prior to, rather than after the election, was to facilitate the closure of the Ohana General Store so that the space cold be used as an office for one new human resources employee who had been hired. Gift bags were also distributed at work after July 29 to those employees who did not attend the luncheon.

It seems unlikely that the luncheon was held on July 29, rather than, for example, the

day after the election (Thursday, August 1), merely because the Employer needed the Ohana General Store space for one new employee, and for no other reason. It is apparent that the offering of items from the Ohana General Store as well as the luncheon itself, coupled with the Employer's "vote no" graphic flashed on the screen, created a scenario that was very pointedly designed to elicit the support of the employees, and to cause them to show their appreciation for the Employer's largesse and compassion, and to demonstrate their loyalty, by voting against the union.

Barbara Hind is assistant executive housekeeper. Hind testified that in September every year there is a national event called National Housekeepers Week. The Employer celebrates this with a week-long celebration for its housekeeping department, and the festivities include gifts, a luncheon, and the giving of other items as a thank-you to the housekeepers for their hard work. In addition, there is an annual Christmas party and raffle for the housekeepers, and at this party the housekeepers are provided the chance to win more expensive items. National Housekeepers Week has been celebrated this way by the Employer for the past 23 years. There is no record evidence that employees other than housekeepers have similar luncheons or parties or enjoy similar benefits during the year, or that there has ever been a party to which all the employees were invited.

In *B&D Plastics*, 302 NLRB 245 (1991) the Board, citing *Gulf States Canners*, 242 NLRB 1326 (1979) sets forth the factors to be evaluated in preelection benefit cases:

> Our standard in preelection benefit cases is an objective one…To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, we examine a number of factors, including (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefit is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive.

While the food and other items distributed to the employees, and the luncheon itself, are of nominal value to each employee, the expense to the Employer in distributing the items, and particularly in preparing a luncheon for over 300 employees who attended, is certainly significant. Clearly the employees recognized that the Employer was expending a considerable sum of money for their enjoyment. And while some employees contributed food or money to help operate the store, neither the luncheon nor the gift bags were limited to those employees. The record shows that the Employer had no past practice, either on a regular or intermittent basis, of providing gifts and a luncheon or party for all its employees; this was an extraordinary event. Under the circumstances, the employees could reasonably conclude that these benefits, conferred upon them two days prior to the election, in a room where "vote no" was periodically flashed on the screen, were intended to influence their vote. Assuming *arguendo* that the Employer had a purely altruistic intent, and was sincerely motivated by reasons other than an attempt to influence the election results, the scenario it orchestrated would clearly have caused a reasonable employee to conclude otherwise.

Accordingly, I recommend that this election objection be sustained. Cf. *Joe's Plastics*, 287 NLRB 210 (providing only coffee and doughnuts determined to be *de minimus* and not unlawful).

Union Objection No. 10 (Discrimination in Working Conditions): …the Employer discriminated in regard to the terms and conditions of employment of employees, by allowing supporters of the Hotel to solicit support during working hours and on working premises while discriminating against the ILWU and/or its agents in order to interfere with the rights of the employees under the act.

Carmelita Fontillas testified that her co-workers told her that quality control supervisors were going from floor to floor telling the housekeepers to vote no. This testimony of Fontillas was stricken from the record as hearsay. The Union did not present any non-hearsay evidence to support this objection, and I recommend that it be dismissed.

Union Objection No. 11 (Supervisor Presence in Polling Area) : …the Employer…interfered with the exercise of Section 7 rights by having a supervisor and/or agent and/or security personnel in the area immediately adjacent to the balloting room and thereby interfered with laboratory conditions and the employees' rights of free exercise to vote.

This objection seems related to Union Objection No. 2, regarding which Virbina Revamonte testified that she was a union observer during the afternoon session on July 31, and that prior to the beginning of the afternoon session she saw about ten large, muscular security personnel wearing black shirts with the Employer's HTH logo standing in a line outside the voting area. She walked past the "line up" on her way to the restroom and heard one of them say, "Kick their ass." She turned her head toward him as saw that he was laughing; and another guard laughed at her also, and a few others were smiling and looking at her. In its brief the Union does not maintain that these individuals remained in the voting area during the election, or that other employees observed them at this location.

Also, on the morning of July 31, the day of the election, , Revamonte testified that she observed some of the Employer's managers and/or agents, including Morgan, John Hayashi, and Patrick Moon, standing at the porte cochere entrance to the hotel; and these individuals were shaking hands with employees and encouraging them to vote.

The voting area was on the third floor of the hotel, well away from the managers and/or agents who were greeting employees as they came to work on the first floor at the *porte cochere* entrance, apparently prior to the time the elections was to begin.

As there is no evidence that either the security guards or managers or agents of the Employer were in the voting area during the election, I recommend that Union's Objection No. 11 be overruled.

Union Objection No. 12 (Discriminatory Hiring and Assignment of Work): …the Employer discriminatorily hired and assigned employees for "special projects," based on pro-union and anti-union sentiment. Further, during the critical period, the Employer provided assignments of work and/or placed employees on the schedule to work in the Banquet Department based upon pro-union and anti-union sentiment.

The Union does not discuss this objection in its brief. As noted above, the testimony of Morgan reflects that in about May, the Employer hired employees for a "special project," namely to keep the facility clean and presentable because of the possibility that a television production company may be interested in reserving a large block of rooms for an extended

period of time to make a television series. There is no evidence showing that the hiring of such employees was based on pro-union or anti-union sentiment. Further, there is no evidence that the Employer assigned work in the Banquet Department based upon pro-union or anti-union sentiment.

I recommend that Union Objection No. 12 be dismissed.

Union Objection No. 13 (Misrepresentation of Union Fees and Dues): …the Employer…misrepresented the union fees and dues structure…and stated that employees would have to pay union fees (as miscalculated) if the Union won the election…

On July 22, the Employer mailed out a sample paycheck and check stub to each employee reflecting what the Employer believed to be the amount of "union/unit fees" that employee would be obligated to pay the Union in the event he or she would have to pay such dues and/or fees. The document states: "This is what your paycheck would look like if you would have to pay union dues on your current pay. Unit fees also have to be paid to the union." The document contains the net pay for the pay period, after deductions, including deductions for union/unit fees, and also the amount of union/unit fees the employee would have paid on a year to date basis.

The only Union evidence in support of this objection was hearsay evidence which was not accepted as being reliable; thus, there has been no showing that the Employer's calculations were incorrect. Even assuming *arguendo* that the calculations were in fact incorrect, the Union had the opportunity to advise the employees of this fact.

I recommend that Union Objection No. 13 be dismissed.

Union Objection No. 14 (Other Improper Acts and Deeds): By such other acts and deeds, the Employer…interfered with and coerced employees in the exercise of their rights under Section 7 of the Act…

The Union proffered no evidence in support of this non-specific allegation, and I recommend that Union Objection No. 14 be dismissed.

4. Conclusions and Recommendations

The Employer and Union stipulated that the ballots of the following 13 voters not be counted:. James Amsbery, Maria Darngun, Chisayo Igarashi, Cirilo R. Lopez, Minh Nguyen, Darryl Oshiro, Jesus l. Paza, Alfredo C. Pescador, Alejandro Rarogal, Mieng Sirivattha, Bert Takahashi, Alejandro Tumbaga, Clayton Woo.

Further, I recommend that the ballots of the following 4 voters not be counted: Jane Fee, Marvin Muraoka, Emyl Schlenker, Lisa Hayashi.

The Employer and Union agree that the ballots of the following 3 voters be counted. : David Tanimoto, Melanie Rubin, Reden Bartolome.

Further, I recommend that the ballots of the following 16 voters be counted: Alma Hamamoto, Rendi Kanaiaupuni, Daniel Kadowaki, Chester Huan, Marlene Morimoto, Scott Kazunga, Donna Hashiro, Elizabeth Fuji, Leslie Shim, Wendy Mukai, Patricia Bell, Brenda Dolente, Shaun Nawatani, Shota Fujinaga, Hidemi Oba, Peter To.

I recommend that Union Objection No. 3, 4, 5, 6, 7, 10, 11, 12, 13 and 14 be dismissed. I recommend that Union Objection No. 1, 2, 8 and 9 be sustained, and conclude that the Employer's conduct prior to the election, particularly the conduct discussed above in Union Objection No. 8 and 9, substantially interfered with the employees' free choice of a bargaining representative. Therefore I further recommend that a second election be conducted in the event a majority of the valid ballots in this election are not cast for the Petitioner.

Within fourteen (14) days from the issuance of this report , any Party may file with the Board in Washington, DC, an original and four copies of exceptions to the report with supporting brief, if desired. Immediately upon such a filing, the Party shall serve a copy of its exceptions and of any accompanying brief on the Regional Director and the other Party, and shall simultaneously submit to the Board a statement of such service. If neither Party files exceptions, the Board may decide the matter forthwith upon the record or may make other disposition of the case.

Dated: February 27, 2003

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Gerald A. Wacknov
Administrative Law Judge